Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

HUGH SYMONS GROUP, plc,

Petitioner,

v.

MOTOROLA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the mere attachment of answers to interrogatories to a motion for summary judgment, without argument or citation of authority, give a party sufficient notice of a separate attack on factual sufficiency so as to satisfy the 5th Amendment's requirement of due process?

PARTIES TO THE PROCEEDING

Petitioner: Hugh Symons Group, plc ("Symons"), a nongovernmental U.K. corporation.

Respondent: Motorola, Inc. ("Motorola"), a nongovernmental corporate party to the proceedings before the United States District Court for the Western District of Texas and the United States Court of Appeals for the Fifth Circuit. Petitioner states that Motorola is a publicly-traded corporation (NYSE symbol, "MOT").

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PETITION FOR A WRIT OF CERTIORARI TO
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HUGH SYMONS GROUP, plc, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

This case is a dispute over a business transaction involving an oral contract, negligent misrepresentation, out-of-pocket expenses, and the Federal Rules of Civil Procedure. The district court's decision is unreported. The Fifth Circuit's opinion is reported as *Hugh Symons Group, plc v. Motorola, Inc.*, 292 F.3d 466 (5th Cir. 2002).

Symons brought suit on April 4, 2000 alleging, *inter alia*, fraud and negligent misrepresentation. The parties consented to trial before a magistrate judge (Hon. Stephen M. Cappelle, U.S. Magistrate Judge). Motorola filed three separate motions for summary judgment, including the one relevant here: the motion for summary judgment on fraud and negligent misrepresentation claims. The district court granted Motorola's three separate motions for summary judgment on August 2, 2001.

Symons' appeal to the Fifth Circuit followed, with that court affirming summary judgment by opinion dated May 28,

2002. In affirming the district court, the Fifth Circuit, for the first time, held the attachment of interrogatories to one motion for summary judgment could constitute a separate motion for summary judgment to which the non-movant must respond. At trial, Motorola never challenged in any way the factual sufficiency of Symons' fraud and negligent misrepresentation claims. Motorola's motion for summary judgment merely challenged the *legal* basis for the claims alleged. Motorola contended only that Symons' fraud and negligent misrepresentation claims were barred by the Statute of Frauds, and by the Texas Deceptive Trade Practices Act's definition of a business consumer.

Never once does Motorola's motion, or the district court's order, challenge the fact that Symons spent $2.5 million developing a wireless mobile computing device, the Pic Pocket. Therefore, the basis upon which the Fifth Circuit affirmed judgment for Motorola – that Symons had to prove facts never in dispute – is unsound. The Fifth Circuit held that since "Motorola included the entire interrogatory package . . . as attachments to two of the three motions for summary judgment," Symons had to respond to Motorola's phantom factual sufficiency challenge. To make matters worse, the troublesome interrogatories upon which the Fifth Circuit's opinion is based, *were not even attached to Motorola's motion for summary judgment on Symons' fraud and negligent misrepresentation claims.* Rather, Motorola simply attached the Interrogatory responses to a separate motion for summary judgment to prove that Symons' assets excluded it from the definition of a business consumer under the DTPA.

Since factual sufficiency was never an issue in the district court, the Fifth Circuit, for the first time, held that attaching answers to interrogatories to a summary judgment brought on purely legal grounds is, in and of itself, a motion for summary judgment requiring the non-movant to prove each and every factual allegation contained in the attached interrogatories. Such a ruling affects every practitioner subject to the Federal Rules.

Motorola never moved on factual sufficiency grounds. The district court did not rule on factual sufficiency grounds. Symons should not have to respond to grounds set forth in a "phantom" summary judgment never at issue in the court below.

JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1332(a)(2). The plaintiff was a subject of a foreign state, the defendant was a citizen of a domestic state, and the amount in controversy exceeded the sum of $75,000 exclusive of interest and costs. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution: Fifth Amendment

Fifth Amendment - Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. The "Pic Pocket" Project

Symons is a small foreign corporation, organized under the laws of England, which had a great idea – the development of a small, wireless, computing device – Symons called the "Pic Pocket." When approached by Symons about

the project, Motorola made representations about its microprocessors that turned out to be false.

In September 1995, while attending a computer exhibition in Las Vegas Geoff Roper and Bruce Jackson of Symons met with Ken Edwards of Motorola. Roper and Jackson outlined Symons' "Pic Pocket" hand held computer project to Edwards. Edwards stated that Motorola had the perfect microprocessor for Symons. Edwards stated that Motorola's MPC 821 chip ("MPC 821") was ideal for the Pic Pocket because of its low power consumption and high performance with great communications features. Edwards then provided Roper and Jackson with preliminary data on the MPC 821.

Over the next few months, Edwards provided Jackson with additional information about the MPC 821, including the technical specifications of the MPC 821. The hardware and software developers for Symons used this information, as well as the preliminary data for the MPC 821, to determine what additional hardware would be needed and what software would be required to develop the Pic Pocket.

In January 1996, Symons purchased its first MPC 821 ADS board from Motorola. Symons also hired additional hardware developers, including Behrooz Chini, and additional software developers, including Paul Chapman. As their work progressed, the hardware and software developers continued to study Motorola's specifications and began utilizing the ADS board.

By March or April of 1996, Symons knew what systems would be required for use with the MPC 821. By now, Symons was committed to using Motorola's chip.

B. Motorola's Motivation

Also in March or April 1996, Roper and Jackson were invited by Edwards to attend a meeting at Motorola's headquarters in Austin, Texas, to discuss the status of the Pic Pocket project. Motorola was very interested in the Pic Pocket because it represented a significant amount of

potential revenue for Motorola. Indeed, Motorola wanted to have its name and logo on the Pic Pocket itself. Motorola's representatives at this meeting included Edwards, C.W. Clark and Arthur Miller. At the meeting, Roper and Jackson again explained Symons' plan for the Pic Pocket's developers. Motorola's representatives stated that the MPC 821 would meet the needs of the Pic Pocket. Edwards outlined the enhancements that Motorola had planned for the MPC 821. At this time, Motorola provided Symons with three MPC 821 chips. All present for Motorola were very excited about the product.

Also in March or April 1996, Jackson and Paul Chapman began the long process of writing the operating system software for the Pic Pocket. They took Sun Microsystems' JAVA-OS, originally written for use with Intel chips, and re-wrote the operating system in order to make it run on Motorola's MPC 821. They finished in September 1996. Between March and September 1996, Symons purchased two additional 821 ADS boards and continued developing the Pic Pocket.

C. Motorola's Misrepresentations

In July or August of 1996, Motorola representatives Edwards, Miller, Axel Streicher and Rodney Watt, and a representative of Motorola's distributor, Arrow, traveled to the U.K. to meet with Roper, Jackson and Chini. By now, Symons' developers knew how the software performed and they had determined the speed at which the MPC 821 would function in a real device. During this meeting, Symons told Motorola that the MPC 821 could only run at 33 MHz, a speed too slow for the Pic Pocket to be viable.

Motorola's representatives countered and said the next revision of the MPC 821 would be boosted from 33 MHz to 120 MHz. Motorola further represented that this next revision of the 821 would be shipped within 18 months.

In December 1996, the Symons design team experienced technical difficulty with the MPC 821. Jackson contacted Edwards for help. Edwards then contacted Watt

who traveled to Symons to assist the design team. At that point, some technical problems were overcome.

By the first quarter of 1997, most of the work that went into the development of the Pic Pocket had been completed. It was also during this time that the issues outlined in the papers of Chini and Jackson – problems with screen flicker, inability of the 821 to operate at a speed beyond 33 MHz, and cache/memory problems – became problematic and could not be resolved. These problems affected the critical functionality of the microprocessor and therefore the commercial viability of the Pic Pocket. Watt returned to Symons in an unsuccessful attempt to work out the problems.

Throughout this period, Motorola consistently maintained and represented to Symons that future revisions of the MPC 821 would increase in speed and that the other problems would also be fixed. Tellingly, Motorola's Errata, published on its web site, also acknowledged the same problems with the MPC 821 and stated that the problems would be fixed in future revisions. Symons purchased three additional 821 boards, as it attempted to design around the problems with the MPC 821 until the revisions were made available.

Then in June of 1998, Watt emailed Chini stating that there would be no future revisions of the MPC 821. This came as a complete surprise as just two weeks earlier Watt had again confirmed Motorola's assurances that revision "c" of the MPC 821 would fix everything.

Jackson then contacted Chris Tully, the General Manager of Motorola's High Performance Imbedded Micro Processors Division. Tully informed Mr. Jackson the reason Motorola would not make further revisions to the 821 was because the only other companies buying the MPC 821 were digital camera manufacturers. Further, because the camera manufacturers were not using the same features of the MPC 821, there was no cost justification to fix the 821. Tully told Jackson to change the design of the Pic Pocket and migrate from the MPC 821 to another processor, the MPC 823.

Chini then contacted Streicher asking for help. In response, Streicher sent to Chini the technical specifications and the manuals for the 823, as well as an MPC 823 ADS board.

In September 1998, utilizing the data and board provided by Streicher, Chini, Jackson and Chapman prepared a feasibility study. They determined the MPC 823 had dramatic changes to the imbedded systems and that the entire hardware system would have to be completely redesigned. They also discovered that although the MPC 823 ran at a higher MHz, it performed slower than the MPC 821 because Motorola had halved the size of the on-chip cache memory. Therefore, even if the hardware was redesigned, the chip would not be suitable.

Jackson relayed to Clark the results of the feasibility study and Chini relayed the same to Streicher. Both Clark and Streicher stated that a new version of the 823 – called the "823 e" – will be the product to fix the performance and would be made available in December 1998. Relying on Motorola's assurances regarding the MPC 823, Chini then began to redesign the Pic Pocket with the available MPC 823 data and ADS board.

In February or March of 1999, when revision "e" had not been distributed, Motorola informed Symons that there was a six month delay in issuing the new version of the chip. At this point, Symons determined there was no choice but to disband the design team.

D. The Pic Pocket Team Disbands

Symons' decision to terminate the Pic Pocket project was based on several factors. First, it became evident that Motorola had been consistently misrepresenting the quality, grade and characteristics of its MPC 821. Second, Motorola offered no guarantees as to when its "e" revision chip would be available. Third, even if it were made available at the new date stated (after the six-month delay) this was not within the window of opportunity to get the Pic Pocket into the market. Fourth, it would take at least 18 months to redesign and

develop a new product using an Intel chip instead of the MPC 821. Lastly, because of the changes in market conditions and the competitive environment that existed by March of 1999 the Pic Pocket was no longer commercially viable.

E. The Courts Below

Motorola moved for summary judgment on Symons' fraud and negligent misrepresentation claims, contending that these claims were barred by the Statute of Frauds.[1] Motorola did not attach any affidavits or any other summary judgment evidence to its motion for summary judgment on Symons' fraud and negligent misrepresentation claims.

The district court granted Motorola's three separate motions for summary judgment on August 2, 2001. Symons' appeal to the Fifth Circuit followed, with that court affirming summary judgment by opinion dated May 28, 2002.

REASONS FOR GRANTING WRIT

A. The 5th Amendment requires notice; the Fifth Circuit does not

The mere attachment of answers to interrogatories does not give a party sufficient notice so as to satisfy the due process requirements of the 5th Amendment. The 5th Amendment requires notice of the motion and the grounds therefore. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). An appellate court cannot scour the record, discover interrogatory answers, and construe them as a separate summary judgment attacking the factual sufficiency of a litigant's claims.

Unfortunately, that is exactly what happened in this case. Motorola attached Symons' unverified interrogatory responses to two *other* motions for summary judgment. The Fifth Circuit held that because of the attachment, Symons had to verify the *amount* of damages it sought to recover.

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[1] Motorola separately moved for summary judgment on Symons' other claims.

Since these grounds were never asserted in Motorola's motion for summary judgment, requiring Symons to respond to factual issues raised in those unverified responses is, in effect, a separate motion for summary judgment of which Symons had no notice.

Previously, the Fifth Circuit recognized a litigant's fundamental due process right to notice required by FED. R. CIV. P. 56(c) and the constitution. The Fifth Circuit has repeatedly held that:

> [I]t would not be proper . . . to affirm a summary judgment on [] grounds that were neither raised below by the [movant] nor even raised *sua sponte* by the district court. It is true that we may affirm a summary judgment on a ground not relied upon by the district court. This Court has clearly held, however, that it will generally not consider a new ground on appeal raised by an appellant in opposition to summary judgment. The same should apply to new grounds raised by an appellee in defense of summary judgment where the parties were not afforded an opportunity to develop the issue below, and it was not implicit or included in the issues or evidence tendered below, so that the party was not on notice of the need to meet it, and the record appears not to be adequately developed in that respect.

F.D.I.C. v. Lee, 130 F.3d 1139, 1142 (5th Cir. 1997) citing *F.D.I.C. v. Laguarta*, 939 F.2d 1231, 1240 (5th Cir. 1991). To hold otherwise would condone a trial, not by affidavit but by ambush, offensive to a litigant's fundamental right to due process of law. *Cf. Celotex*, 477 U.S. at 326.

The Fifth Circuit's startling abandonment of this tenet affects every practitioner subject to the Federal Rules. Manufacturing a *sua sponte* summary judgment for the first time on appeal flies in the face of decades of precedent. Of course, appellate courts may affirm a summary judgment on grounds not relied upon by the trial court. *Missouri Pac.*

R.R. v. Harbison-Fischer Mfg. Co., 26 F.3d 531, 538 (5th Cir. 1994). However, those grounds must be proposed or asserted in the trial court by the movant. *See id. See also Laguarta*, 939 F.2d at 1240 (refusing to affirm summary judgment on grounds "neither raised below . . . nor even raised *sua sponte* by the district court"). An appellate court cannot grant a new summary judgment *sua sponte* for the first time on appeal. This is the logical corollary to the rule that an appellate court should not consider a new ground in defense of a summary judgment on appeal. *See Johnson v. Sawyer*, 120 F.3d 1307, 1316 (5th Cir. 1997) citing *Laguarta*, 939 F.2d at 1240.

In this case, Motorola never contended, and the district court never suggested (much less held) that the summary judgment was granted against Symons on factual sufficiency grounds. As in *Lee*, Symons simply had no notice that the *amount* rather than the *nature* of Symons' claimed damages was at issue. After all, the *law* supports Symons.

B. The law supports Symons

The district court granted summary judgment on legal sufficiency grounds. After the district court's decision, but before the Fifth Circuit's opinion, the Texas supreme court issued *Haase v. Glazner*, 62 S.W.3d 795 (Tex. 2001), which held that out-of-pocket losses were outside of the Statute of Frauds and could be recovered on a negligent misrepresentation claim.

Symons only sought to recover $2.5 million in out-of-pocket expenses it incurred on Motorola's misrepresentations. Motorola never contested the *amount or the existence* of Symons' damages. Rather, Motorola contested the *nature* of Symons' damages, arguing that as contract damages, they were barred by the Statute of Frauds.

Haase torpedoed Motorola's argument. *Haase* mandated reversal of the district court's summary judgment on Symons' fraud and negligent misrepresentation claims.

Haase merely affirmed the longstanding rule that in Texas, a tort claim brought with a breach of contract claim is

only barred if the claimant does not suffer any damage other than the subject matter of the contract. *See Jim Walters Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). Indeed, the contractual relationship of certain parties "may create duties under both contract and tort law." *Id.* (citing *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508 (Tex. 1947).

Thus does a fraud claim for out-of-pocket damages survive the statute of frauds. *Haase v. Glazner*, 62 S.W.3d 795 (Tex. 2001). Indeed, "the statute of frauds does not bar recovery over a claim of fraud or misrepresentation which sounds in tort." *Hiller v. Manufacturers Prod. Research Group of N. Am., Inc.*, 59 F.3d 1514, 1536 (5th Cir. 1995). Therefore, because of *Haase*, Motorola failed to negate an essential element of Symons fraud and negligent misrepresentation claims. The Fifth Circuit should have reversed the district court on purely legal grounds.

C. The facts were never contested – Motorla did not even attach the Interrogatories to its motion for summary judgment here at issue;

Proof that Motorola did not contest the factual sufficiency of Symons' claims – but instead moved only on the law – is found by the fact that Motorola did not even attach the Interrogatory responses to its motion for summary judgment on Symons' fraud and negligent misrepresentation claims. This is because the Interrogatory responses were only attached to show assets relevant to the determination of Symons' consumer status under the DTPA. There was no challenge to factual sufficncy in Motorola's motion for summary judgment on Symons fraud and negligent misrepresentation claims. Thus, even if the Interrogatory responses have any significance, they are not relevant to Symons' fraud and negligent misrepresentation claims.

Motorola framed the issues in its motion for summary judgment on Symons' fraud and negligent misrepresentation claims as a purely legal question: "Since Hugh Symons's claims for fraud, negligent misrepresentation, and DTPA

violations sound in contract, does the Statute of Frauds bar these claims?" In Texas, determination of a Statute of Frauds defense is a question of law. *Gerstacker v. Blum Consulting Eng'rs, Inc.*, 884 S.W.2d 845, 849 (Tex.App.- Dallas 1994, writ denied).

To uphold the summary judgment on fraud and negligent misrepresentation, the Fifth Circuit reviewed the attachments to separate motions on other causes of action, and held that Symons had to prove the factual sufficiency of its responses. Such a holding deprives a litigant of fundamental due process rights, overturns decades of uniform precedent among federal circuits, and imposes a standard different from that set forth by this Court, the rules and the Constitution on summary judgment.

D. An attachment cannot become a motion for summary judgment in and of itself

It is axiomatic that the non-movant is entitled to know the grounds for summary judgment considered by the district court. *See Rogan v. Menino*, 175 F.3d 75, 79 (1st Cir. 1999). An attachment to a separate motion for summary judgment cannot – and did not in this case – give the non-moving party notice that it would be additional grounds considered to uphold a summary judgment.

The attachments in this case, could not constitute a separate motion for summary judgment. Indeed, Motorola simply used those attachments in support of its argument that Symons was not a business consumer under the DTPA. Motorola did not cite the attachments in its motion for summary judgment on Symons' fraud and negligent misrepresentation claims. The district court did not rely on the attachment when it granted summary judgment on Symons' fraud and negligent misrepresentation claims.

However, the Fifth Circuit held, for the first time on appeal and *sua sponte*, that these attachments to other motions were indeed a challenge to the factual sufficiency of Symons' claims challenged in another, separate motion for

summary judgment. the Fifth Circuit erred; such a result cannot stand.

E. The Fifth Circuit ignored the affidavit setting forth out-of-pocket expenses

Additionally, the Fifth Circuit ignored Symons' sworn proof that it incurred out-of-pocket expenses in developing the Pic Pocket. In a sworn statement, Symons' CFO, Colin Fisher, declared that the "Intangible Assets R&D for Pic Pocket" were £1,084,000 (or $1,749,901.20 based on "closing interbank rate at 31st March 1999" of £1=$1.6143). The intangible assets sworn to here must include some of the out-of-pocket expenses Symons incurred. Thus, in any event, there is competent summary judgment evidence verifying and substantiating Symons' out-of-pocket expenses.

CONCLUSION

For the reasons set forth above, this issue is exceptionally important. The Fifth Circuit holds that attachments to one motion for summary judgment can constitute another, separate motion for summary judgment to which the non-movant need reply. Such a result cannot be allowed to stand.

THEREFORE, Petitioner HUGH SYMONS GROUP, PLC, requests of this Court that it GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(Any footnotes trail end of each document)
No. 01-50835

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HUGH SYMONS GROUP, plc,
Plaintiff - Appellant,

v.

VERSUS MOTOROLA, INC.,
Defendant - Appellee.

May 28, 2002, Decided

COUNSEL:
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JUDGES:
Before KING, Chief Judge, and SMITH and PARKER, Circuit Judges.

OPINION BY:
ROBERT M. PARKER

OPINION:

ROBERT M. PARKER, Circuit Judge:

Appellant Hugh Symons Group, plc ("Hugh Symons"), appeals the district court's grant of summary judgment to appellee Motorola, Inc. ("Motorola"). We affirm.

I. Background.

In 1995, representatives of Concept Technologies, Ltd. ("Concept") and Motorola met at an electronics trade show in Las Vegas, Nevada. Concept was a wholly-owned subsidiary of Hugh Symons, both based in the United Kingdom. Concept was seeking electronic components for development of its conceptual handheld computer, the "Pic Pocket." Motorola described its MPC 821 microprocessor as a possible component.

Motorola provided a circuit card and a few MPC 821 chips for Concept's suitability determination. Concept found that the MPC 821 was too slow, but Motorola asserted that the next version would be substantially faster. By 1997, Concept also found that the chip produced screen flicker and had cache/memory problems, making it unsuitable for the Pic Pocket. Motorola continued to indicate that future versions would be improved. In June 1998, however, Motorola announced that it would not produce any new versions of the MPC 821 because its only other users were digital camera manufacturers who did not rely on the features that Concept needed improved.

Motorola suggested another microprocessor, the MPC 823. Concept found that it was slower and required a complete hardware re-design. Motorola replied that version "e" would fix the problems. In early 1999, however, Motorola announced a six-month delay of the MPC 823e. Concept decided that it had missed its marketing window for the Pic Pocket and abandoned the concept.

In April 2000, Concept sued Motorola under federal diversity jurisdiction in the Western District of Texas for violating Texas's Deceptive Trade Practices Act ("DTPA"), breaching an oral contract, and acting fraudulently and with negligent misrepresentation regarding the quality, grade, and characteristics of the MPC 821. On December 29, 2000, Hugh Symons was substituted by motion as plaintiff of record.

The parties consented to trial by a magistrate judge. In April 2001, Motorola filed motions for summary judgment on all claims. On August 2, 2001, the magistrate judge issued a

Memorandum Opinion and Order with a Final Judgment granting summary judgment to Motorola. He found that Hugh Symons was not a "consumer" under the DTPA because it had over $ 25 million in gross assets; that Hugh Symons failed to satisfy the statute of frauds; and that the tort claims sounded in contract and failed because there was no breach of contract. Hugh Symons appeals each claim.

II. Standard of Review.

We conduct a *de novo* review of a grant of summary judgment, ensuring that no genuine issue of material fact exists and that judgment in favor of the appellee was warranted as a matter of law. *See St. Paul Guardian Ins. Co. v. Centrum GS Ltd., 283 F.3d 709, 712-13 (5th Cir. 2002); Haynes v. Pennzoil Co., 207 F.3d 296, 299 (5th Cir. 2000).* Under FED. R. CIV. P. 56(c), summary judgment is appropriate when the evidence, viewed in the light most favorable to the non-movant, reflects no genuine issues of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Hall v. Gillman, Inc., 81 F.3d 35, 36-37 (5th Cir. 1996).*

Unsubstantiated assertions are not competent summary judgment evidence. *Celotex, 477 U.S. at 324; Forsyth v. Barr, 19 F.3d 1527, 1533* (5th Cir.)(unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence), *cert. denied, 513 U.S. 871 (1994).* Mere conclusory allegations are not competent summary judgment evidence and are insufficient to overcome a summary judgment motion. *Eason v. Thaler, 73 F.3d 1322, 1325 (5th Cir. 1996).*

III. Analysis.

A. DTPA Claim.

Hugh Symon claims that Motorola violated the DTPA, TEX. BUS. & COM CODE § 17.44, by "misrepresenting the quality, grade and characteristics of its MPC821 micro

processing chip." The elements of a valid DTPA complaint are: (1) the plaintiff is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts; and (3) these acts constituted a producing cause of the consumer's damages. *Chamrad v. Volvo Cars of North America, 145 F.3d 671, 672 n.3 (5th Cir. 1998)* (citing *Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 38 Tex. Sup. Ct. J. 732 (Tex. 1995))*. A consumer is defined as:

An individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, *except that the term does not include a business consumer that has assets of $ 25 million or more, or that is owned or controlled by a corporation or entity with assets of $ 25 million or more.*

Id. § 17.45(4)(emphasis added). Therefore, a complaining plaintiff under the DTPA must be a consumer meeting the definition of § 17.45(4). *Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983).*

"Assets" for the purposes of § 17.45(4) means "gross assets." *See Eckman v. Centennial Savings Bank, 784 S.W.2d 672, 673 n.3, 674 (Tex. 1990).* Hugh Symons's total gross assets exceed $ 25 million, disqualifying it as a "consumer" capable of bringing a claim under the DTPA. It contends, however, that Concept Technologies was the interested party bringing the DTPA suit and that Concept had less than $ 25 million in assets. Further, Hugh Symons asserts that it transferred its shares in Concept to Elata, plc, on October 17, 2000. n1 Symons then substituted in as the plaintiff on December 29, 2000. Concept then assigned its interest in the DTPA suit to Symons on March 5, 2001.

Where a DTPA plaintiff is asserting a claim acquired by assignment, the assignor's consumer status controls. *PPG Indus., Inc. v. JMB/Houston Ctr. Partners Ltd. Partnership, 41 S.W.3d 270, 279* (Tex. App.–Houston [14th Dist.] 2001, no pet.). Therefore, Hugh Symons contends, because Concept held less than $ 25 million in assets, it was a consumer under the DTPA and Hugh Symons, as its assignee, may pursue the

suit. We disagree. At all pertinent times - at the time of the alleged violation of the DTPA and at the time that the lawsuit was brought - Concept was a wholly-owned subsidiary of Symons. Despite the later transfer of shares within the Hugh Symons family of businesses, § 17.45(4) acts to bar an entity controlled by another with assets of greater than $ 25 million from bringing a DTPA suit because it is a non-consumer.

We affirm the magistrate judge's ruling that Hugh Symons and Concept were not consumers under the DTPA.

B. Breach of Contract Claim.

Hugh Symons alleges that Motorola breached an oral contract. It admits that this oral contract is subject to the statute of frauds.

The Texas statute of frauds requires a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is a sought for the sale of any goods for the price of $ 500 or more. The lack of such a writing bars enforcement of the alleged oral contract. *See* TEX. BUS. & COM. CODE § 2.201(a). Where a plaintiff seeks to enforce an alleged oral contract, it has the burden of proving that the statute of frauds is satisfied. *Vehle v. Brenner, 590 S.W.2d 147, 152* (Tex. Civ. App.–San Antonio 1979, no writ); *Zimmerman v. H.E. Butt Grocery Co., 932 F.2d 469, 471 (5th Cir. 1991).*

Hugh Symons claims two exceptions to the statute of frauds. First, it claims that, as between merchants, it received a writing in confirmation of the contract in accordance with § 2.201(b). Second, it claims that the alleged contract is valid because it was in respect to goods for which Symons made payment and accepted under § 2.201(c)(3).

On the first point, Hugh Symons asserts that "[a] flurry of correspondence was exchanged between the parties confirming the agreement to supply suitable MPC 821 chips in sufficient quantity for commercial distribution of the Pic Pocket," citing by example a brief excerpt of a January 1998 email from Motorola to Hugh Symons regarding MPC 821 pricing. Read in full, the email does not confirm any such

agreement. At best, it can be read as preliminary information being exchanged between parties, one of whom is developing a product not yet in production. There is no language expressing or contemplating a final agreement or settling on terms; it is an overture to further joint discussion or ongoing negotiations, not a binding agreement. *See Haase v. Glazner, 62 S.W.3d 795, 797, 45 Tex. Sup. Ct. J. 141 (Tex. 2001).* Hugh Symons's other brief examples are similarly unconvincing.

As to its second point, Symons points to a copy of a "PRO FORMA INVOICE" showing the shipment of an MBX821 Board valued at $ 460 from Motorola to Hugh Symons on January 13, 1998, claiming that this demonstrates "payment and acceptance" under § 2.201(c)(3). The invoice, however, is clearly labeled "pro forma," lists only the board's value (as opposed to its cost), does not demand payment, and was intended to accompany "commodities licensed by the U.S. for ultimate destination UNITED KINGDOM." Hugh Symons has produced no receipts, drafts, electronic transfer records, or checks to show that it ever paid Motorola for any component or service. It points instead to its response to Motorola's interrogatory, indicating that it (or Concept) paid for B#150,000 worth of "Components and Sundry Production costs," which "must have" included amounts paid to Motorola for the chips and boards. It offers no evidence other than this conclusory statement. An unsubstantiated or conclusory assertion is incompetent summary judgment evidence and cannot defeat a motion for summary judgment. *Celotex, 477 U.S. at 324; Eason, 73 F.3d at 1325; Forsyth, 19 F.3d at 1533.*

Hugh Symons has not shown that it meets any exception to the statute of frauds.

C. Fraud and Negligent Misrepresentation Claims.

Generally, under Texas law, a plaintiff may not recover in tort for claims arising out of an unenforceable contract under the statute of frauds. *Haase, 62 S.W.3d at 799.* To the extent, however, that a plaintiff's fraud claim seeks out-of-pocket damages incurred by relying upon a defendant's

misrepresentations, those damages are not part of the benefit of any bargain between the parties. They therefore might be recoverable without contravening the statute of frauds. *Id. at 799-800.*

Hugh Symons asserts that it (or Concept) spent $ 2.5 million based on Motorola's allegedly negligent misrepresentation of its microchip's performance and fraudulent promises of improvement. It claims that it may recover under *Haase*, which was decided after the instant lawsuit was litigated. We need not determine whether that is true because Hugh Symons has produced no competent evidence of its expenditures.

In response to Motorola's Interrogatory Number Five, which required Hugh Symons to "state the full amount of money you seek and describe the manner in which the amount was calculated," Hugh Symons reported that it was seeking $ 2.5 million (converted from B#1,554,000 at the rate of B#1 = $ 1.6143) for "Components and Sundry Production costs . . . Employment Costs . . . General Overheads . . . Depreciation of Fixed Assets . . . Finance Charges . . . [and] Group Facilities[] - Office Rental, HR, MIS, etc." It asserts that the respective figures were extracted from its accounts after an audit, but has produced no verification of its interrogatory response or any document whatsoever supporting its expenditure claim. At oral argument, counsel for Hugh Symons admitted that the figure of $ 2.5 million remained unverified.

We might be concerned that Hugh Symons had not been on sufficient notice that it needed to verify its response if Motorola's motion for summary judgment was based on an issue of law. A review of the filings in the trial court, however, reveals that Motorola included the entire interrogatory package, with Hugh Symons's responses, as attachments to two of the three motions for summary judgment, n2 challenging certain of Hugh Symons's assertions. Most notably, however, in Hugh Symons's response on the fraud, negligent misrepresentation, and DTPA claims, it specifically claimed that it "had expended at least two and one half million dollars in development of

hardware and software" and that "the damages sought by [Hugh Symons] are the two and one half million dollars spent developing the software and hardware for a wireless device that never worked because the MPC 821 never performed as Motorola said it would." It is clear that Hugh Symons was responding to Motorola's challenge to its claims of fact and had sufficient notice that it needed to verify or substantiate its otherwise-unsupported allegation of expenditure. It failed to do so. Again, an unsubstantiated assertion is incompetent to defeat a motion for summary judgment. *Celotex, 477 U.S. at 324; Eason, 73 F.3d at 1325; Forsyth, 19 F.3d at 1533.*

IV. Conclusion.

For the reasons stated herein, we AFFIRM the trial court's grant of summary judgment on each issue.

Footnotes

n1 Elata is, however, "a sister company of the Assignee [Symons] in that the voting shares in both companies are owned by the same people and in the same proportions." *See* Appellant's Record Excerpts, tab 8 at 1 P 0.2.

n2 The interrogatories were attached to the motions for summary judgment on the DTPA and breach of contract issues.

A-00-CA-222SHC

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTER DISTRICT OF TEXAS AUSTIN DIVISION

HIGH SYMONS GROUP PLC,
Plaintiff,

v.

MOTOROLA, INC.,
Defendant.

Filed August 2, 2001

MEMORANDUM OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT MOTION TO DISMISS. AND MOTION TO STRIKE AMENDED PLEADING

Before the Court are Motorola' a Motion for Summary Judgment on Hugh Symons's DTPA Claims filed April 20, 2001 (Doc. #23); Plaintiff Hugh Symons Group PLC's Responses to Motorola's Motion for Summary Judgment DTPA Claims filed May 11, 2001 (Doc. #34); and Motorola's Reply Brief in Support of its Motion for Summary Judgment on Hugh Symons's DTPA Claims filed May 25, 2001 (Doc. #39)

Also before the Court are Motorola's Motion for Summary Judgment on Hugh Symons's Breach of Contract Claim filed April 20, 2001 (Doc. #22); Hugh Symons Group PLC Response to Motorola's Motion for Summary Judgment on Hugh Symon's [sic] Breach of Contract Claim filed May 11, 2001 (Doc. #33); and Motorola's Reply Brief in Support of its Motion for Summary Judgment on Hugh Symons' Breach of Contract Claim filed May 25, 2001 (Doc. #40). The Court has also considered Defendant's Memorandum of Authorities in Support of Motorola's Motion for Summary Judgment on Hugh Symon's [sic] Breach of Contract Claim filed July 12, 2001 (Doc. #51).

Also before the Court are Motorola's Motion for Summary Judgment on Hugh Symons's Fraud, Negligent Misrepresentation, and DTPA Claims filed April 20, 2001 (Doc. #24); Plaintiff Hugh Symons Group PLC's Response to Motorola's Motion for Summary Judgment to Fraud, Negligent Representation, and DTPA Claims filed May 11, 2001 (Doc. #32); and Motorola's Reply Brief in Support of its Motion for Summary Judgment on Hugh Symons's Fraud, Negligent Misrepresentation, and DTPA Claims filed May 25, 2001 (Doc. #41).

Also before the Court are Motorola's Motion to Dismiss for; Failure to Plead Fraud and Negligent Misrepresentation with Particularity filed April 23, 2001 (Doc. 25); Hugh symons Group's Response to Motorola's Motion to Dismiss Plaintiff's Claims of Fraud & Misrepresentation filed May 8, 2001 (Doc. #29); and Motorola' s Reply in Support of its Motion to Dismiss for Failure to Plead Fraud and Negligent Misrepresentation with Particularity filed May 21, 2001 (Doc. #37).

Also before the Court are Motorola's Motion to strike Hugh Symons' s Putative First Amended Complaint or, in the Alternative, to Extend time to File an Answer Responsive to Hugh Symons's Putative First Amended Complaint filed May 21, 2001 (Doc. #36); Hugh Symons Group's Response to Motorola's Motion to Strike Hugh Symons Group's First Amended Complaint and Response to Motorola's Reply in Support of its Motion to Dismiss Plaintiff's Claims of Fraud & Misrepresentation field May 25, 2001 (Doc. #42); and Motorola's Reply in Support of its Motion to Strike Hugh Symons's Putative First Amended Complaint filed June 5, 2001 (Doc. #46).The Court has also considered Defendant's Memorandum of Authorities in Support of Motorola's s Motion to Strike Hugh Symons's Putative First Amended Complaint filed July 12, 2001 (Doc. #50).

A hearing was held on all the above—listed motions on July 12, 2001, at 10:00 a.m. After considering the motions, responses, replies, and arguments of counsel presented at the

hearing, the court makes the following determinations.

I. STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment is appropriate under Rule 56 (c) of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986).

This Court will consider the summary judgment evidence in the light most favorable to the non-movant; however, the non—movant may not rely on mere allegations in the pleadings, but must respond to the motion by setting forth particular facts indicating that there is a genuine issue for trial. See Mississippi River Basin Alliance v. Westphal 230 F.3d 170, 174 (5th Cir. 2000) (citing Anderson, 477 U.S. at 248—49.) "After the non—movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." Id. (citing Celotex Corp. V. Catrett, 471 US. 317, 322, 106 S. Ct. 2548, 2552 (1986) and FED. R. CIV. P. 56(c)).

II. ANALYSIS AND CONCLUSIONS

A. Motion for Summary Judgment on DTPA Claims

Defendant Motorola Inc. ("Motorola") contends that it is entitled to summary judgment as to Plaintiff Hugh Symons Group PLC's ("Hugh Symons")fn1 Texas Deceptive Trade Practices Act ("DTPA") claims because Hugh Symons does not qualify as a "consumer" as defined by the DTPA. Specifically, Motorola argues that because Hugh Symons's gross assets are over $25 million, it is expressly excluded as a consumer under the DTPA. In addition, Motorola argues that

because Hugh Symons did not purchase goods or services from Motorola, or have an agreement to do so, it does not qualify as a consumer under the DTPA.

In response, Hugh symons does not dispute that its gross assets total over $25 million, but argues that its consumer status under the DTPA should be based instead on its net assets, which total only $1 million. Hugh Symons also disputes Motorola's contention that it never sought to acquire or acquired goods from Motorola. Hugh Symons argues that it acquired certain goods from Motorola, as evidenced by the invoices it has attached to its response, and that its representatives exchanged emails with Motorola's representatives regarding Hugh Symons's interest in acquiring Motorola's MPC 821 micro processor chips for inclusion in the wireless computing device Hugh symons was developing.

At the hearing, counsel for Motorola pointed out to the court7 that the Texas Supreme Court has interpreted the tern "assets" under the DTPA to mean "gross assets" held by a putative consumer. See Eckman v. centennial Sav. Bank, 784 s.W.2d 672, 673-74 (Tex. 1990). In response, counsel for Hugh Symons stated that the Texas Supreme Court's interpretation of the term "assets" under the DTPA was not part of the holding in Eckman, arguing that this court should not follow language that does not even constitute dicta in Eckman, but should look to the definition of assets set for in the Uniform Fraudulent Transfer Act, which defines assets to exclude those things encumbered by a valid lien because such assets do not reflect the debtor's ability to pay debts as they become due. See TEX. BUS & COMM. CODE § 24.002(A).

As for Hugh Symons's claim that its invoices constitute evidence that it purchased goods from Motorola, counsel for Motorola informed the Court at the hearing that the invoices provided by Hugh Symons merely show that no direct purchase of Motorola goods were ever made because the goods were either provided by Motorola free of charge or purchased from an entity other than Motorola. As for the

email correspondence provided by Hugh Symons, counsel for Motorola argued that it expressly shows that Motorola and Hugh Symons never reached an agreement for the purchase of Motorola's micro processor chips.

The Texas Supreme Court held in Eckman that the defendant bears the burden to plead and prove the applicability of the $25 million exception to business consumer status under the DTPA as an affirmative defense. 784 S.W. 2d at 676. The opinion also noted the finding of the trial court that Eckman lacked standing under the DTPA because its gross assets exceeded $25 million, id. at 673-74, and further calculated gross assets for purposes of addressing the issue of whether the individual defendants qualified as business consumers under the DTPA in a related footnote. See id. at 673, n.3.

A 'business consumer" with assets in excess of $25 million is specifically excluded from the definition of "consumer." See TEX. BUS.& COMM. CODE ANN. § 17.45(4). The parties in this case do not dispute that Motorola had properly plead the affirmative defense of the $25 million exception under the DTPA, or that Hugh Symons's gross assets exceed $25 million. While the Court can find no published opinion from the Texas courts expressly holding that gross assets are to be calculated in determining whether or not the plaintiff has standing as a consumer under the DTPA, neither has the Court uncovered an opinion rejecting or even questioning the gross asset calculation used by the trial court and noted by the Texas Supreme Court in Eckman. Keeping in mind the statutory purpose of the DTPA to protect unsophisticated consumers, thus excluding sophisticated business consumers in control of substantial wealth, the Court is loathe to hold that a business with gross assets totaling over $25 million qualifies as an unsophisticated consumer in need of the protections of the DTPA. See Alcan Aluminum Corp. v. BASF Corp., 133 F. Supp. 2d 482, 501 (N.D. Tex. 2001) ("Those with less wealth are presumably less able to protect themselves adequately against deceptive trade practices and more in need of the additional protection of the DTPA. Business consumers with assets in excess of $26 million can also exert

more influence on those with whom they do business, such that treble damages are less likely needed to deter deceptive trade practices."). Accordingly, the Court finds that Hugh Symons's claims under the DTPA are precluded by the language of the statute.

IT IS THEREFORE ORDERED that Motorola's Motion for Summary Judgment on Hugh Symons's DTPA Claim is GRANTED. Plaintiff Hugh Symons Group PLC'S DTPA claims are DISMISSED.

B. Motion for Summary Judgment on Breach of Contract Claim

Motorola contends that Hugh symons's Complaint alleges an oral agreement that violates the statute of frauds and fails to specify the quantity of goods Motorola allegedly agreed to sell to Hugh Symons. In response, Hugh Symons contends that while the oral agreement alleged in its Complaint does not meet the formal requirements of the statute of frauds found in TEX. BUS. & COMM. CODE ANN. § 2.201(a), the evidence it has produced, in the form of a series of email communications between representatives of Motorola and Hugh Symons and Motorola's invoice for a MBX 821 Board purchased by Hugh Symons to be used for development of Hugh Symons's mobile computing device, is sufficient to satisfy the exceptions to the requirements of the statue of frauds under TEX. BUS. & COMM. CODE ANN. §§ 2.201(b) and (c).

In its reply, Motorola asserts that the email communications identified by Hugh Symons do not provide written confirmation of an oral agreement with Motorola as required under section 2.201 (b). The invoices Hugh Symons has produced, Motorola argues, are also not sufficient evidence under section 2.201 (c) because they do not involve the purchase of goods for $500 or more. The most expensive invoice for a MBX 821 Board priced at $460, Motorola contends, is not an invoice for purchase, but rather a "Pro Forma Invoice" generated for shipping and customs purposes

only for a Board that was provided to Hugh Symons at no cost.

The statute of frauds provides that

> a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the parties against whom enforcement is sought.

TEX BUS. & COMM. CODE ANN. § 2.201 (a). Neither Hugh Symons's Original Complaint nor its First Amended Complaint allege the existence of a written agreement between Hugh Symons and Motorola. In Paragraph 7 of the Original Complaint, Hugh Symons alleges that it "and Motorola entered into an oral agreement whereby Motorola agreed to manufacture and supply its microprocessor chip . . . as the power source for [Hugh Symons's] new mobile network computer named the 'Pic Pocket.'" (emphasis added). Hugh Symons's First Amended Complaint alleges only that "Motorola agreed to supply micro processing chips suitable for running the Pic Pocket." See Paragraph 26 of Plaintiff's First Amended Complaint (Doc. #28). In light of Hugh Symons's judicial admissions in its pleading of an oral agreement, the Court finds that the alleged contract at issue in this case is subject to the provisions of the statute of frauds and that Motorola has established its defense of the statute of frauds as a matter of law. See Hammonds v, Calhoun Distributing Co., 584 S.W.2d 473, 474—75 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e); "Moore" burger. Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 936 (Tex. 1972).

When the plaintiff claims that he is seeking to enforce an oral agreement, he bears the burden of proof to show that the statute of frauds is satisfied. See McClure v. Duggan, 674 F. Supp. 211, 218 (N.D. Tex. 1987) (citing Martco. Inc. v. Doran Chevrolet, Inc., 632 S.W.2d 927, 929 (Tex. App.—Dallas 1982, no writ)). The defendant discharges his burden of proof as

the movant under the summary judgment standard by pointing out the absence of evidence that the statute of frauds has been satisfied. Id. at 217 (citing Celotex, 477 U.S. 317, 106 S. Ct. at 2554).

After reviewing the summary—judgment evidence, the Court finds that Motorola has met its burden of proof. Hugh Symons has failed to produce evidence to raise a genuine issue of fact as the existence of sufficient writings indicating any agreement by Motorola to sell its micro processor chips to Hugh Symons to be used in the production of the Pic Pocket. Therefore, the Court is of the opinion that Motorola's motion should be granted.

IT IS THEREFORE ORDERED that Motorola's Motion for Summary Judgment on Hugh Symons's Breach of Contract Claim is GRANTED. Plaintiff Hugh Symons Group PLC's breach of contract claim is DISMISSED.

C. Motion for Summary Judgment and to Dismiss on Fraud and Negligent Misrepresentation Claims

Motorola argues that Hugh Symons's claims of fraud, negligent misrepresentation, and promissory estoppel are based on an alleged oral contract that tails to satisfy the statute of frauds. Therefore, Motorola asserts, under Texas law the statute of frauds also bars Hugh Symons's tort claims.n2.

In response, Hugh Symons argues that its pleadings sufficiently allege separate tort claims not based on the alleged oral contract with Motorola. Hugh Symons asserts that the factual allegations in its First Amended Complaint make clear that it relied on the misrepresentations of Motorola's representatives. after the alleged oral agreement was consummated, and that, as a result, it expended approximately $2.5 million on research and development of the Pic Pocket. Because none of the tort claims asserted rely on written memorializations of the misrepresentations on which Hugh Symons relied, Hugh Symons argues, they were

not part of or subsumed by the alleged oral agreement.

The Court's review of Hugh Symons's pleadings and summary-judgment evidence reveals that its fraud and negligent misrepresentation claims are tied to its allegations of the existence of an oral agreement for Motorola to sell micro processor chips to Hugh Symons. Since Motorola's conduct would give rise to liability only because it breached the oral agreement, Hugh Symons's tort claims sound only in contract. Flameout Design & Fabrication. Inc. v. Pennzoil Caspian corp., 994 S.W 2d 830, 838 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (citing Southwestern Bell Telephone Co. v. DeLaney, 809 S.W.2d 493, 494 (Tex. 1991)).

The statute of frauds, when utilized as an affirmative defense in a breach of contract action, also bars claims of common law fraud, negligent misrepresentation, violation of the Deceptive Trade Practices Act, and promissory estoppel. See Nagle V. Nagel, 633 S.W.2d 796, 800—01 (Tax, 1982). "Where the plaintiff is seeking . . . to recover what he would have gained had the [oral agreement] been performed, it is apparent that his action, while cast in language sounding in tort, is an indirect attempt to recover for the breach of the unenforceable [oral agreement], and is barred by the statute of frauds." Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e). Further, because Motorola proved as a matter of law that the alleged oral agreement was unenforceable, Hugh Symons may not utilize promissory estoppel as a basis of enforcing an illegal oral agreement. See Wheeler v. White, 398 S.W.2d 93, 96—97 (Tex. 1965).

IT IS THEREFORE ORDERED that Motorola's Motion for Summary Judgment on Hugh Symons's Fraud, Negligent Misrepresentation, and DTPA Claims is GRANTED. Plaintiff Hugh Symons Group PLC's fraud, negligent misrepresentation, and promissory estoppel claims are DISMISSED.

Having dismissed Plaintiff Hugh Symons Group PLC'S fraud and negligent misrepresentation claims in granting Motorola's summary—judgment motion on the same claims, the Court FURTHER ORDERS that Motorola's Motion to Dismiss for Failure to Plead Fraud and Negligent Misrepresentation with Particularity is DENIED AS MOOT.

D. Motion to Strike First Amended Complaint

Motorola requests that the Court strike Hugh Symons's First Amended Complaint because it was filed after the date specified under the agreed amended scheduling order, and it was filed without leave of Court or consent from Motorola in violation of FED. R. CIV. P. 15(a). In response, Hugh Symons argues that it filed its First Amended Complaint in compliance of the District Court's Order granting its motion for leave to file an amended pleading substituting Hugh Symons as Plaintiff. Hugh Symons further argues that the addition of one new claim in its First Amended Complaint simply refines its causes of action, clarifies its legal theories in response to Motorola's objections, is based on the same set of facts, and causes no undue prejudice or surprise to Motorola. In its reply, Motorola argues that Hugh Symons's First Amended Complaint acids three new causes of action that do prejudice Motorola, and further argues that the amendments far exceed the District Court's Order granting Hugh Symons's request to change the name of the plaintiff in the style of the case.

There are six non—exclusive factors upon which a court may conclude that justice does not require leave to be granted to a party seeking to amend its pleadings: undue delay; bad faith;' repeated failure to cure deficiencies in previous amendments; undue prejudice: and futility. See Forman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). Despite Hugh Symons's contention that it was granted leave by the District Court to amend its Complaint, this Court's review of the record reveals that the District Court's Order of January 23, 2001 (Doc. #13) merely granted Plaintiff leave to substitute Hugh Symons as Plaintiff in the case. Hugh Symons was not

granted leave to add any new causes of action.

According to the Amended Scheduling Order1 the deadline for filing amended pleadings was December 29, 2000. Hugh Symons filed its First Amended Complaint without leave of Court on May 7, 2001. Hugh Symons's untimely filing clearly constitutes undue delay. Even assuming Hugh Symons had been granted leave to file an amended complaint by the District Court's January 23, 2001 Order, this Court notes that Hugh Symons did not file its First Amended Complaint for approximately three and a half months. Moreover, the Court finds that the addition of as many as three new causes of action in its First Amended Complaint imposes undue prejudice on Motorola. Therefore, the Court concludes that Hugh Symons's First Amended Complaint should be stricken.

IT IS THEREFORE ORDERED that Motorola's Motion to Strike Hugh Symons's Putative First Amended Complaint or, in the Alternative, to Extend Time to File an Answer Responsive to Hugh Symons's Putative First Amended Complaint is GRANTED as follows:

The Court ORDERS that Plaintiff Hugh Symons Group PLC's First Amended Complaint be STRICKEN. All additional claims raised in the First Amended Complaint are therefore DISMISSED.

Final Judgment in the case shall follow entry of this Memorandum Opinion and Order.

SIGNED this 22ND day of August, 2001.

UNITED STATES MAGISTRATE JUDGE
STEPHEN H. CAPELLE
PRESIDING UNDER 28 U.S.C. § 636 (c)

Footnotes

Fn1 Hugh Symons Group PLC was substituted as Plaintiff in the case by Order of the Court after it acquired the original plaintiff, Concept Technologies Limited.

fn2. Motorola's motion also seeks summary judgment on Hugh Symons's DTPA claims. Having previously dismissed Hugh Symons's DTPA claims in this Memorandum Opinion and Order based on Hugh Symons's lack of standing as a consumer under the statute, the Court need not address Hugh Symons's DTPA claims in this motion for summary judgment.

In addition, the court also notes that Hugh Symons's promissory estoppel claim was added in its First Amended Complaint, which was filed after Motorola filed this summary judgment motion. Therefore, Motorola does not address that claim in this summary-judgment motion except in its reply. Because this new tort claim raises the same issue addressed by Motorola in its motion for summary judgment on Hugh Symons's fraud and negligent misrepresentation claims, the Court will include the additional promissory estoppel claim in its ruling on Motorola's motion for summary judgment. The additional claims alleged for the first time in Hugh Symons's First Amended Complaint will be addressed in the Court's analysis of Motorola's motion to strike to follow.